IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
UNION TRUST COMPANY, as Trustee, etc., et. al.,
Defendants in Error.
No. 2031

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
ELEANOR CAMPBELL O'KELLEY, as Executrix, etc.,
Defendant in Error.
No. 2032

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error.
vs.
HENRY ROSENFELD, et al., as Trustees, etc.,
Defendants in Error.
No. 2033

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error,
vs.
GEORGE D. BLISS JR., as Executor, etc.,
No. 2034

AUGUST E. MUENTER, Collector, etc.,
Plaintiff in Error,
vs.
ALFRED FRIEDERICH et al.,
Defendants in Error.
No. 2035

Upon Writs of Error the Circuit Court of the United States for the Northern District of California.

BRIEF FOR DEFENDANTS IN ERROR.

MARSHALL B. WOODWORTH,
Attorney for Defendants in Error.

Edward Lande,
Of Counsel.

FILED

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BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The only question involved in the five above entitled cases is one of law: Whether the legacies taxed by the Government were vested or contingent legacies; if the former, they were subject to taxation; if the latter, they were not subject to taxation on July 1, 1902, the date of the repeal of the Spanish American War Tax Law.

The above entitled five cases were consolidated in the Court below for the purpose of trial; a "Consolidated Bill of Exceptions" was signed and filed in the five cases, which will be found contained in the Transcript of Record in case No. 2031, (Muenter vs. Union Trust Co. of San Francisco). (See page 91 et. seq. of Transcript of Record, in case No. 2031 for "Consolidated Bill of Exceptions").

The Transcripts of Record in the four other cases, to-wit: No. 2032, 2033, 2034 and 2035 do not contain the "Consolidated Bill of Exceptions," but contain the pleadings and such other documents as are pertinent to each separate case.

The learned representative of the Government has filed a "consolidated brief" in the five cases now before this Honorable Court and we presume it is proper for us to follow the same course. Therefore, this brief will constitute our reply brief in the five cases now pending before the Court.

On June 13, 1898, Congress passed a War Revenue measure for the purpose of raising money to defray the cost of the Spanish American war. (30 Stat. 464).

Among other taxes imposed, was one on legacies and distributive shares exceeding $10,000 in actual or clear value and passing from the testator or decedent to certain classes of relatives and to persons not related to the family.

This law was amended on March 2, 1901, in respect to matters not material to the question involved in the above entitled cases. (31 Stat. 948).

The Spanish-American War having been victoriously concluded, Congress, on April 12, 1902, repealed the war revenue law of June 13, 1898, said repeal to take effect July 1, 1902, (32 Stat. 96).

The question arises, whether the legacies or distributive shares became vested on or before July 1, 1902, the date when the repeal of the law became effective, or whether they were of such contingent character as to exempt them from taxation.

Congress, on June 27, 1902, (just four days before the repeal took effect on July 1, 1902), passed a refunding Act, Section 3 of which contains the following:

"Sec. 3 That in all cases where an executor, administrator, or trustee shall have paid, *or shall hereafter pay*, any tax upon any legacy or distributive share of

personal property under the provisions of the Act approved June 13th, eighteen hundred and ninety-eight, entitled "An Act to provide ways and means to meet war expenditures, and for other purposes, and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on *contingent beneficial interests which shall not have become vested prior to July 1st, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July 1st, nineteen hundred and two.*" (32 Stat., 406; Chap. 1160).

All of the taxes in the above entitled cases for which recovery is now sought from the Government, were assessed and paid to the Government subsequent to the repeal of the law on July, 1, 1902.

A brief epitome of the taxes paid and other salient features involved in the five cases is as follows:

I.

Union Trust Company of San Francisco vs. August E. Muenter, as Collector, etc. } No. 13,761 (in the Court below)

Estate of John J. Valentine.

The legacies from this estate are being held in trust until the youngest of the children, Philip C. Valentine, shall attain his majority, which will not be until May, 7, 1920.

Amount of tax sued for $1661.00.

Amount of tax recovered $1661.00.

Tax assessed May 22, 1903 (nearly one year after repeal of law on July 1, 1902.)

Tax paid May 27, 1903. (nearly one year after repeal of law on July 1, 1902.)

Tax paid May 27, 1903 (nearly one year after repeal of law on July 1, 1902.)

Claim to refund filed June 13, 1903.

Interest computed from May 27, 1903.

Amount of judgment, with interest to January 18, 1911, $2549.49, and costs taxed at $97.30.

II.

Louis Rosenfeld, et al. vs. August E. Muenter, as Collector,etc.	No. 14,615 (In the Court below)

Estate of John Rosenfeld.

The legacies from this estate were to be held in trust until May 28, 1913.

Amount of tax sued for $4062.90.

Amount of tax recovered $3912.90.

Tax assessed July 20, 1903 (over one year after repeal of law on July 1, 1902).

Tax paid July 29, 1903 (over one year after repeal of law on July 1, 1902).

Claim to refund filed June 2, 1905.

Interest computed from July 29, 1903.

Amount of judgment with interest to January 18, 1911, $5958.80 and costs taxed at $26.60.

III.

Eleanor Campbell O'Kelly, -
vs.
August E. Muenter, as Collector, etc. } No. 14,567 (In the Court below)

Estate of Allen G. Campbell.

The legacies from this estate were to be held in trust until the daughter should reach 21 years, which would be some time during 1921.

Amount of tax sued for $1341.09.

Amount of tax recovered $1341.09.

Tax assessed May , 1903 (nearly one year after repeal of law on July 1, 1902).

Tax paid May 12, 1903 (nearly one year after repeal of law on July 1, 1902).

Claim to refund filed May 11, 1905.

Interest computed from May 12, 1903.

Amount of judgment with interest to January 18, 1911, $2062.38, and costs taxed at $28.80.

IV.

Alfred Friederich, et al
vs.
August E. Muenter, as Collector, etc. } No. 14,786 (In the Court below)

Estate of Gustav Friederich.

The legacies from this estate were to be held in trust until August 2, 1904, when the youngest child would attain twenty one years.

Amount of tax sued for $432.88.

Amount of tax recovered $432.88.

Tax assessed July, 1904 (two years after repeal of law on July, 1902).

Tax paid July 14, 1904 (two years after repeal of law on July 1, 1902).

Claim to refund filed July 12,1905.

Interest computed from July 14, 1904.

Amount of judgment with interest to January 18, 1911, $630.60 and costs taxed at $28.40.

V.

George D. Bliss, Jr.
v.
Estate of George D. Bliss.

No. 14,730
(In the Court below)

The legacies from this estate were to be held in trust so long as the daughter of Harriet L. Herrmann should continue to be the wife of George Herrmann, and she was the wife at the time of the repeal of the law on July 1, 1902, and still is such wife.

Amount of tax sued for $1497.95.

Amount of tax recovered $113.68.

Tax assessed February, 1904 (nearly two years after repeal of law on July 1, 1902).

Tax paid February 3, 1904 (nearly two years after repeal of law on July 1, 1902).

Claim filed to refund February 1, 1906.

Interest computed from February 3, 1904.

Amount of judgment with interest to January 18, 1911, $169.05, and costs taxed at $28.00.

In all of the cases, it was admitted by the pleadings and upon the trial that the taxes on the several legacies were assessed by, and were paid to, the Government officials, as alleged in the several complaints; that the taxes were paid under protest in every instance; that the claims to refund said taxes were duly and regularly filed with the proper Government officials and were prosecuted as required by law; and that the Government has not refunded any of said taxes involved in any of the above entitled cases.

As the ultimate question to be decided by this Honorable Court is whether or not the legacies were vested or contingent at the time of the repeal of the law on July 1, 1902, and as this is largely a question of law, we will present this feature of the case in the argumentative part of this brief.

ARGUMENT ~~COMPLAINT~~ AND AUTHORITIES.

We have carefully read the Brief of Plaintiff in Error, and frankly confess that we are unable to ascertain upon what ground a reversal is asked.

The broad contention is made, that the legacies were all vested, (see pages 6 and 7 of Brief of Plaintiff in Error), but not a single authority is cited, nor any argument indulged in, to which we feel called upon seriously to reply.

Indeed, it is to be observed, at the outset, that the assistant United States Attorney,who represented the Government in the Court below, (Mr. George Clark), practically conceded the right of the several plaintiffs in the above five entitled cases to recover judgments.

In the case of the estate of John J. Valentine, (August E. Muenter, etc., Plaintiff in Error, vs. The Union Trust Company of San Francisco, etc., et al. Defendants in Error, No. 2031, in this Court). The Assistant United States Attorney stated to the trial Court: "I think in that case the plaintiff should recover"* * * "That would remove it from any doubt as to whether the decree of distribution would cover this particular claim. I think in that case the plaintiff should recover." (See Transcript of Record in case No. 2031, p. 101).

In the case of the estate of John Rosenfeld, (August E. Muenter, etc., Plaintiff in Error, vs. Louis Rosen-

feld and Henry Rosenfeld, etc., Defendants in Error, No. 2033, in this Court), the Assistant United States Attorney stated to the trial Court: "It would seem to me your honor could make a judgment that the plaintiff recover the tax imposed insofar as it was imposed upon the Trust estate as shown by the exhibits." * * I do not want to be put in the position of consenting to a judgment of that sort. I will say in that case that it appears to be a case coming within the rule of Union Trust Company vs. Muenter." (See Transcript of Record in case No. 2031, p. 106; also p. 109).

In the case of the estate of Allen G. Campbell, (August E. Muenter, etc., Plaintiff in Error, vs. Eleanor Campbell O'Kelly, Defendant in Error, No. 2032, in this court), the Assistant United States Attorney stated to the trial court: "The will is extremely long, your Honor, and I have gone through it hurriedly, and I think that is the provision creating and subjecting the property to control of the mother, and it would seem that the will does come within the rule laid down in the case of Union Trust Company vs. Lynch, and that in this case judgment would go for the plaintiff." (See Transcript of Record in case No. 2031, p. 111).

In the case of the estate of Gustav A. Friederich, (August E. Muenter, etc., Plaintiff in Error, vs. Alfred Friederich et al., Defendants in Error, No. 2035 in this court), the Assistant United States Attorney stated to the trial court: "I think that covers the facts." (See Transcript of Record, p. 119).

In the case of the estate of George D. Bliss, (August E. Muenter, Plaintiff in Error, etc. vs. George D. Bliss, Jr., etc. Defendant in Error, No. 2084, in this court), the following proceeding took place in the trial court: "Mr. Woodworth—In the case of Bliss, there is no dispute with reference to the trust estate left to Mrs. Hermann, nor is there any dispute as to the amount, which is $111.54." * * * "So the only thing left in this case is $111.54, in addition to the sum of $2.14 for the tax upon those 10 shares of stock in the Ditch Company." (See Transcript of Record, pp. 132-133).

The then Assistant United States Attorney, in consenting that judgment should go for the plaintiffs,afterwards qualified his consent as follows: "The United States Attorney, in stating that judgment should go for the Plaintiff in certain cases, did not consent to the judgments referred to, but merely indicated that in view of the previous ruling of the court in the case of Union Trust Company vs. Lynch, affirmed by the Circuit Court of Appeals, it would not be contended that this Court should not enter the judgments mentioned." (See Transcript of Record in case No. 2031, page 136).

There are thirty-one assignments of error, but they all converge to but one single question; Were the legacies vested or contingent on July 1, 1902, the date of the repeal of the law.

It is difficult to conceive upon what theory the learned representative of the Government, under the assignments of error and the condition of the records, hopes to obtain a reversal.

The decisions of the Supreme Court of the United States and of this Circuit Court of Appeals are conclusive upon the proposition that the legacies involved in the cases at bar were all of a contingent character. They did not vest and could not vest absolutely in possession or enjoyment until long after July 1, 1902, the date of the repeal of the law.

Vanderbilt vs. Eidman, 196 U. S. 280; 49 L. Ed. 563.

Lynch vs. Union Trust Co., 164 Fed. Rep. 161.

The allegations of the complaints and the admissions of the answers and the proofs in the five cases at bar show conclusively that the taxes were imposed by the Internal Revenue Collector on legacies which never vested absolutely in possession or enjoyment up to the time of the repeal of the law, which took effect on July 1, 1902 (32 Stat. 96).

Indeed, the legacies in four of the cases now before this Court have not vested, even at the date of writing this brief.

Without encumbering this brief with copious references to the wills in each case, it will be sufficient to state the ultimate facts as to the vesting of the legacies and, in doing so, we refer to the statement of facts contained in the Brief of Plaintiff in Error.

Taking up each case individually, the following facts are presented, which clearly indicate that the legacies are contingent:

In the first case, entitled Muenter vs. The Union Trust Company of San Francisco et al. (No. ~~2130~~ 2031), "The estate was by final decree of distribution distributed in accordance with the provisions of said will, the residue of said estate being distributed to the defendant in error, Union Trust Company of San Francisco, as trustee, to be held in trust for the benefit of the seven children of the deceased, the remaining defendants in error herein, *until the youngest child should attain his or her majority, which will be on May 7th*, 1920, *and not before.*" (See Brief of Plaintiff in Error, pp. 3-4).

In the second case, entitled Muenter vs. O'Kelly, (No. 2032) it appears "that in accordance with certain provisions of that will, certain personal property which was taxed by the plaintiff in error was distributed to Eleanor Campbell O'Kelly as trustee, to be held in trust for the benefit of his daughter, Eleanor Campbell, *until his daughter should reach the age of* 21 *years which will be some time during the year* 1921." (See Brief of Plaintiff in Error, p. 4).

In the third case, entitled Muenter vs. Rosenfeld, (No. 2033) it appears: "That certain personal property, subject to the tax in question, was distributed to defendants in error, Louis Rosenfeld and Henry Rosenfeld, as trustees, for the benefit of the children of the

deceased *until a period of eleven years after his death should elapse provided some one of the children and beneficiaries should so long survive, otherwise the trust should terminate upon the death of the last survivor. This trust does not expire until May* 28, 1913." (See Brief of Plaintiff in Error, pp. 4 and 5).

In the fourth case, Muenter vs. Bliss (No. 2034), "it appears that certain personal property and legacies were distributed under the terms of the will of George D. Bliss, deceased, to certain trustees, *to be held in trust for the benefit of one Harriet L. Hermann, so long as she should remain the wife of George Hermann. At the time of the levy of the tax in question, and at the time of the trial of the suit, Harriet L. Herrmann was still the wife of George Herrmann.*"

(See Brief of Plaintiff in Error, p. 5).

In the fifth case, entitled Muenter vs. Friederich, (No. 2035), "the facts show that by the last will of Gustav A. Friederich certain personal property was distributed to two trustees, *to be held in trust for the benefit of certain legatees until the youngest of them should attain the age of* 21 *years. This trust* e*xpired August* 2*nd*, 1904." (See Brief of Plaintiff in Error, p. 5).

It must be obvious, from this conceded statement of facts in these five cases that the legacies were contingent, beneficial interests which had not vested in absolute possession or enjoyment at the time of the

repeal of the war tax law, which took effect on July 1st, 1902.

The Refunding Act, passed by Congress on June 27, 1902, (just four days before the repealing act took effect on July 1, 1902), provides explicitly that any taxes collected on "contingent, beneficial interests which shall not have become vested prior to July 1, 1902" should be refunded. (32 Stat. 406).

As was appositely said by Judge Morrow in Union Trust Company vs. Lynch, 148 Fed. Rep. 54: "The tax was repealed on July 1, 1902, and after the decree was entered in this case on June 26, 1901, the law itself was only in existence one year and four days, and the statute says specifically that when it is not vested at the time the repealing statute went into effect no tax shall be collected; that is, then the specific command of this statute is that unless a person receives a legacy of more than $10,000 which *vests* in the absolute possession and enjoyment of such person prior to the passing of this repealing act, there can be no tax. That is the *specific, direct, positive, unqualified direction* of the *statute* which this court cannot evade."

The authorities are all one way in our favor on the proposition.

In the leading case of Vanderbilt vs. Eidman, 196 U. S. 480; 49 L. Ed. 563, it was held that the interest of a residuary legatee, conditioned on his attaining a

certain age, cannot be deemed taxable under the war revenue act of June 13, 1898, (30 Stat. at. L. 464, Chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), secs. 29, 30, before the happening of the contingency, in view of the express provisions of those sections as to "possession or enjoyment" and "beneficial interest" and "clear value," and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment is subordinated to an uncertain contingency.

The seventeenth clause of the last will and testament of Cornelius Vanderbilt provided as follows:

"SEVENTEENTH: All the rest, residue, and remainder of all the property and estate, real, personal, and mixed, of every description, and wheresoever situated, of which I may die seized or possessed or to which I may be entitled at the time of my decease. * * * I give, devise, and bequeath to my executors, hereinafter named, and the survivors and survivor of them, IN TRUST, to hold said estate, and invest and re-invest the same, and to collect the rents, issues, income, and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance, and education, and for the care and maintenance of his property during his minority and to accumulate any surplus income, such accumulations

to be paid to him when he arrives at the age of twenty-one years, and thereafter to pay the net income of said estate to him as received *until he arrives at the age of thirty years.*"

Four questions were certified to the Supreme Court of the United States from the United States Circuit Court of Appeals for the Second Circuit, but the Supreme Court only deemed it necessary to consider the third question certified, which was as follows: "III. Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will with the exception of his present right to receive the income of such estate until he attains the age of thirty years prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?"

This question was answered in the negative by the United States Supreme Court.

Mr. Justice White, now Chief Justice, delivering the opinion of the Court, said, among other things: "In view of the express provision of this statute as to possession or enjoyment and beneficial interests and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested

interest in the case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached. And such is the construction which has been affixed to some statutes, the text of which lent themselves more strongly to the construction that it was the intention to subject to immediate taxation merely technical interests, without regard to a present right to possess or enjoy." (Citing Re Curtis, 142 N. Y. 219, 222, 36 N. E. 887; Re Roosevelt, 143 N. Y. 121, 25 L. R. A. 695, 38 N. E. 781. In re Hoffman, 143 N. Y. 327, 38 N. E. 311, Billings vs. People, 189 L. 472, 486, 59 L. R. A. 807, 59 N. E. 798; Howe vs. Howe, 179 Mass. 546, 550, 55 L. R. A., 626, 61 N. E., 225).

And the Supreme Court closed its opinion as follows, "Concluding, as we do, that there was no authority under the Act of 1898 for taxing the interests of Alfred G. Vanderbilt, given him by the residuary clause of the will, conditioned as his attaining the age of thirty and thirty-five years respectively, it is unnecessary to determine whether such interest was technically a vested remainder, as claimed by counsel for the Government. In passing, however, we remark that in a case recently decided by the Court of Appeals of New York (Re Tracy, 179 N. Y. 506, 72 N. E. 519) it was declared that such interest was a contingent, and not a vested remainder."

This decision is on all fours with the cases at bar and is conclusive upon the proposition that the legacies were contingent.

The identical question has arisen before this Circuit Court of Appeals in the case of Lynch vs. Union Trust Company, 164 Fed. Rep. 161.

That case is squarely in point. The material facts were:

"Richard H. Follis, a resident of the City and County of San Francisco, died May 31, 1900, leaving a last will whereby, after certain provisions, he left the rents, issues, and profits thereof, and, after necessary expenditures for care, maintenance, insurance, etc: (6) to pay the net proceeds of the income, rents, issues and profits of said trust quarterly, upon the first day of each and every quarter of the year equally, share and share alike to all of my children, Margaret, James, Richard, Mary and George, up to and until such time, as each of them shall respectively attain the ages following, that is to say: Until said Margaret E. Follis, now wife of Dr. De Vecchi, shall attain the age of thirty-nine years; until said James H. Follis shall attain the age of thirty-three years; until said Richard H .Follis shall attain the age of thirty-one years, until said Mary Lily Follis shall attain the age of twenty-nine years, and until said George Clarence Follis shall attain the age of twenty-seven years."

Addressing itself to the question whether these legacies were vested or contingent, the Circuit Court of Appeals for this Circuit, speaking through District Judge Van Fleet, said, (after referring to the leading case of Vanderbilt vs. Eidman, supra, and other cases):

"Applying the principles announced in these cases to the facts here presented, it would seem to be obvious that the interests sought to be taxed under the will of Follis did not fall within the term of the statute. Confessedly the only present right passing to these beneficiaries was that of receiving the income from the corpus of the estate in the hands of the trustees. Such an interest does not, for the reason aptly stated by Judge Gray in Disston v. McLain, fall within the definition of either a legacy or a distributive share, in the sense in which those terms are employed in the Act. It matters not that this right to the income may, as contended by counsel for the government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries. It may, indeed, be conceded that this is a correct characterization of the estate conferred. But the question is: Does the Act undertake to impose any burden upon such an interest? Very clearly it does not in express terms; and under the doctrine of strict construction, heretofore referred to, the application of those terms is not to be extended by implication beyond their plain, usual and ordinary sense. As suggested by Judge Gray, the act says nothing about taxing the mere right to an income before that income is actually received; and, had such been the intention, it would have been a very easy matter to express the purpose. Instead, Congress has contented itself, in designating the estates that shall be burdened with

the tax, by employing terms having general and well understood significations, and by those terms must its purpose be limited.

"Moreover, as held in Vanderbilt vs. Eidman, the purpose of the Act was to subject to taxation only beneficial interests which by reason of being absolutely vested in possession or enjoyment have a value capable of being definitely ascertained—"actual value" as expressed in Section 29, or "clear value" as expressed in Section 30. The estate or interest here sought to be taxed was very clearly not of that character. While the right to receive the income was vested, it was a right the enjoyment of which, as with the legatee in Disston vs. McLain, *was contingent upon the beneficiaries living to receive them.*" * * *

"Without pursuing the analogies further, we are satisfied that in no essential particular of the rights of the legatees involved in this case to be distinguished in their legal aspects from those involved in Disston v. McLain, and that, in accord with the conclusion reached in that case, it must be held that the only interest these legatees received under the will of the testator which could probably have been subjected to taxation under the act in question was the amount of income actually received and enjoyed prior to the date when the repeal of the act took effect; and, as that sum as to no one of them reached the amount of $10,000, there was nothing to which the tax could attach."

See, to the same effect, the case of Fidelity Trust Co., etc. vs. United States, Court of Claims, Vol.....

And in the case of Hertz, etc. vs. Woodman, et al., 218 U. S. 205; 54 L. Ed. 1001, while that was a decision in favor of the Government under the facts of that case (which are not pertinent to those involved in the case at bar), the Supreme Court, speaking through Mr. Justice Lurton, is very careful to state that its decision does not apply to contingent interests, (such as are involved in the case at bar), or life estates.

The Court says:"Upon the facts certified, the right of succession which passed by the death of the testator was an absolute right to the immediate possession and enjoyment—a right neither postponed until the falling in of a life estate, as in Mason vs. Sargent , 104 U. S. 689, 26 L. Ed. 894, *nor subject to contingencies*, as in *Vanderbilt v. Eidman*, supra."

The only question involved in the case of Hertz vs. Woodman was this: "Does the fact that the testator dies within one year immediately prior to the taking effect of the repealing act of April 12, 1902, relieve from taxation legacies otherwise taxable under secs. 29 and 30 of the Act of June 13, 1898, as amended by the act of March 22, 1901?"

This question does not arise in the cases at bar; but the question is directly raised, in the cases at bar, as to whether the legacies were vested or contingent,

and Mr. Justice Lurton expressly recognizes that a legacy, postponed until the falling in of a life estate, as in Mason vs. Sargent, Supra, or subject to contingencies, as in Vanderbilt vs. Eidman, is not subject to taxation.

See, also, the following authorities, to the same effect:

Disston vs. McLain, 147 Fed. 114, 77 C C. A. 340.

In re Curtis, 142 N. Y. 219, 36 N. E. 887.

In re Roosevelt, 143 N. Y. 121, 25 L. R. A. 695, 38 N. E. 781.

In re Hoffman, 143 N. Y., 327, 38 N. E. 311.

Billings vs. People, 189 111, 472, 59 L. R. A. 807, 59 N. E. 798,

Howe vs. Howe, 179 Mass. 546, 55 L. R. A. 626, 61 N. E. 225.

Herold vs. Shanley, 146 Fed. 20, 76 C. C. A. 478.

It is a cardinal rule in the construction of statutes imposing taxes, and especially burdens of special or unusual nature, that, in cases of doubt or ambiguity, every intendment is to be taken against the taxing power.

Eidman vs. Martinez, 184 U. S. 578, **583**, 46 L. Ed. 697.

Disston vs. McLain, 147 Fed. 114, **116**, 77 C. C. A., 340.

Lynch vs. Union Trust Co., 164 Fed. Rep. 161, **163**.

Addressing ourselves to the argument contained on pages 6, 7 and 8 of the brief of Plaintiff in Error, we have to say that Counsel is in error when he contends that the legacies in the several cases at bar had vested absolutely in possession or enjoyment.

It is not a mere equitable interest in a legacy which is taxed but the test is, that the tax attaches when there is a present right to the *immediate* possession and enjoyment of a legacy. While the legatees in the several cases at bar undoubtedly had an equitable interest in the several legacies, still they had *no immediate right to the present and absolute possession and enjoyment of the same.* The possession and enjoyment of the legacies was postponed to some time in the future and depended upon contingencies of an uncertain character. The fact was ever present that the legatees might die before the consummation of the contingencies and such were the condition of all of the legacies involved in the several cases at bar at the time the repeal of the war tax law took effect on July 1, 1902.

As was well said by District Judge Van Fleet, delivering the opinion of this Court in the case of Lynch vs. Union Trust Co., 164 Fed. Rep. 161, **166**, "Confessedly the only present right passing to these beneficiaries was that of receiving the income from the corpus on the estate in the hands of the trustees. Such

an interest does not, for the reasons aptly stated by Judge Gray in Disston vs. McLain, fall within a definition of either a legacy or a distributive share, in the sense in which those terms are employed in this act. It matters not that this right to the income may, as contended by counsel for the Government, constitute an equitable interest in the trust fund, the present beneficial enjoyment of which is in the beneficiaries. It may, indeed, be conceded that this is a correct characterization of the estate conferred. But the question is: Does the act undertake to impose any burden upon such an interest? Very clearly it does not in express terms; and under the doctrine of strict construction, heretofore referred to, the application of those terms is not to be extended by implication beyond their plain, usual and ordinary sense. As suggested by Judge Gray, the act says nothing about taxing the mere right to an income before that income is actually received; and, had such been the intention, it would have been a very easy matter to express the purpose. Instead, Congress has contented itself, in designating the estates that shall be burdened with the tax, by employing terms having general and well understood significations, and by those terms must its purpose be limited."

It is conceded, on the part of the Plaintiff in error that: "In all cases the income from the property distributed in trust is to be paid to the beneficiaries *and in no one instance is the income equal to*

the sum of ten thousand dollars a year."

Counsel for the Government is in error when he states, on page 7 of his brief, that: "Up to the present time the question involved in these cases has never been definitely settled by the Supreme Court of the United States."

The question involved in the several cases now before this Court, viz.: whether the legacies are vested or contingent, was clearly, definitely and unanimously settled by the Supreme Court of the United States in the case of Vanderbilt vs. Eidman, supra, which is the leading case on the subject and which has never been overruled or modified since its rendition.

And the law of this Circuit, following the decision of the Supreme Court of the United States in the case of Vanderbilt vs. Eidman, is to the same effect, and was most clearly announced in Lynch vs. Union Trust Company, supra, a case on all fours, on principle and authority, with the cases at bar.

It is a significant fact that a petition for a writ of Certiorari, made on behalf of the Government, in the case of Lynch vs. Union Trust Company, was denied by the United States Supreme Court (214 U. S. 523; 33 L. Ed. 1007).

Counsel for the Government, in his brief on page 7, ventures the suggestion that there is now pending before the United States Supreme Court a case involv-

ing the precise proposition involved in the cases under discussion.

But he does not refer to any particular case, and our investigations warrant us in stating that there is not at present any case pending before the United States Supreme Court involving the precise proposition raised in the cases at bar. In fact, the Supreme Court of the United States has repeatedly and consistently denied petitions for writs of certiorari in cases raising questions similar to those involved in the cases at bar. As already stated, the decision of the Supreme Court of the United States in the case of Vanderbilt vs. Eidman was unanimous on the question there decided and which is directly raised and involved in the cases at bar.

With all due deference to the learned counsel of the Government, we respectfully submit that, neither upon reason nor authority, has he advanced any substantial ground justifying a reversal of any of the cases at bar, and we confidently maintain that the judgments should be affirmed with costs.

Respectfully submitted,

Attorney for Defendants in Error.

Of Counsel.